

M/s.Kushal Constructions .. Petitioner
Versus
Gunvant Ramlal Shah & Ors. .. Respondents

Mr.G.S.Godbole for petitioner
Mr.Dhakephalkar, Senior Advocate with Mr.Harshad
Deshpande for respondent Nos. 1 and 2.
A.G.P. for State.

CORAM : S.C.DHARMADHIKARI, J.
Reserved: 15th June 2007.
Pronounced: 18th July 2007.

ORAL JUDGEMENT: -

Rule. Respondent Nos. 1 and 2 are contesting respondents and Mr. Deshpande waives notice for them. Learned A.G.P. waives service for respondent Nos. 3 to 5. By consent of parties, Rule made returnable forthwith.

2. This petition under Articles 226 and 227

of the Constitution of India is directed against an order passed by the Minister of State for Cooperation, Marketing and Textile Department of Government of Maharashtra dated 12th June 2006 in Revision Application No.399 of 1999.

3. That Revision Application was directed against an order passed by Joint Registrar of Cooperative Societies (Appeals) Pune Division in Appeal No.102 & 108 of 1999. The Joint Registrar, C.S. Pune passed an order in the appeals which in turn were directed against the order passed by the Deputy Registrar, C.S.Pune dated 22nd/30th July 1999.

4. Petitioner is partner of one M/s.Kushal Construction, which is carrying on business as Builder and Developer. It has its office at the address mentioned in the cause title.

5. Petitioner was granted development rights

in respect of property bearing C.T.S.No.553 of 1989, Rasta Peth, Pune. It is owned by one Lilawati R. Shah. Petitioner, pursuant to the development rights, constructed multi-storyed building on the said property, apartments/flats in which in turn were sold to several persons. The property in all admeasures 4914.07 sq.mtrs. and is spread over the S.Nos.553, 558 and 589A. Petitioner constructed 90 residential tenaments, 71 shops and stores. Thus in all 180 tenaments, spread over Wings A to I, have been constructed by the petitioner.

6. It is not in dispute that the petitioner is a promoter within the meaning of the said term, appearing in Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short 1963 Act). Petitioner has taken a sum of Rs.1460/- as advance per flat purchaser. Petitioner pursuant to the development and

construction of the property placed various purchasers in possession of the flats/tenements under Individual agreements with them.

7. It is the case of petitioner that individual apartments were elaborately described in the deed of declaration. The deed of declaration was registered in the office of the sub-Registrar, Haveli II, Pune at Sr.No.3147.

8. The argument, therefore, all through out is that once the deed of declaration was executed and registered under the provisions of The Maharashtra Apartment Ownership Act, 1970 (for short 1970 Act) then section 10 of the 1963 Act would apply and it is impermissible to register a Coop.Society of the purchasers/occupants of the apartments in such a building.

9. Despite this legal position, on 24th March 1999 an application was filed by the first

respondent for registration of second respondent as a cooperative housing society. It appears that upon this application, notice was issued to the petitioner and the petitioner appeared and opposed the application on the ground that a Deed of registration being duly executed and registered, now, it is not permissible to register a coop.society.

10. The grievance is that by brushing aside this grievance, the Dy.Registrar C.S.Pune passed an order on 22nd July 1999 permitting first respondent to file such an application and also reserving a name for the second respondent society. The Dy.Registrar permitted opening of bank account. A copy of this order is annexed as Annexure B to the petition.

11. Later on, the said Dy.Registrar passed an order under section 9 of the C.S. Act 1960 and registered the second respondent as coop.society.

12. Aggrieved by this order, the petitioner preferred an appeal being appeal No.103 of 1999 before Divisional Jt.Registrar, C.S. Pune. The First Appeal was filed challenging the order dated 22nd July 1999 and further appeal bearing No.108 of 1999 was filed challenging the registration of the society and an order made in that behalf on 30th July 1999.

13. The Divisional Jt.Registrar C.S. initially passed an interim order on 11th August 1999. This interim order being in favour of petitioner, it was assailed and challenged by respondent Nos. 1 and 2 by filing a revision application before Minister.

14. Grievance of the petitioner is that this revision application was allowed by the Secy.Department of Coop. & Textiles without hearing the petitioner. Therefore, W.P.5578 of

1999 was filed in this Court which was allowed by this Court on 22nd October 1999 and after restoring the interim order, this Court directed the Appellate authority to dispose of the appeals expeditiously.

15. The Appellate Authority after allowing parties to file their replies and written arguments, passed a common order in the aforesaid appeals, on 22nd November 1999, a copy of which is annexed to the petition as Annexure H.

16. The appellate authority dismissed the above appeals.

17. Aggrieved by this rejection and dismissal, the petitioner approached the State Govt. by filing Revision Application No.399 of 1999 and the Revisional Authority initially stayed the orders of the Appellate Authority.

18. In the meanwhile, the petitioner contends that several persons/flat purchasers who had jointed in the registration proposal of the society, including the first respondent got their Deeds of apartment executed from petitioner. Based upon these deeds of apartments, these occupants/flat purchasers transferred their respective apartments by creating third party rights. Thus, the initial fact situation underwent a radical change. Be that as it may, the petitioner as well as respondent Nos.. 1 and 2 before me pursued the revision application and placed their written arguments setting out the subsequent developments as well. Petitioner contended that 141 flat purchasers have executed deeds of apartments and, thus, majority of them do not intend to be governed and managed so also administered by a cooperative housing society. They would prefer to have an Association of such apartment owners to manage their affairs. Written arguments of both sides were taken on

record and the Revision Application No.399 of 1999 was placed for hearing and final disposal before the Minister. By the order under challenge in this petition dated 12th June 2006, the Revision Application is dismissed.

19. Aggrieved by the concurrent orders and findings, petitioner developer is invoking the writ jurisdiction of this Court under Article 226 and 227 of the Constitution of India.

20. Mr.Godbole learned Counsel for petitioner submits that the Minister who decided the Revision Application committed grave error in dismissing the revision application. The revision application ought to have been allowed inasmuch as the Dy.Registrar as also the Jt.Regr. were in patent error in concluding that a coop.society can be registered. Mr.Godbole submits that the authorities have completely misread and misconstrued the provisions of the

Ownership Act and Coop.Societies Act respectively. He submits that 1963 Act and The Maharashtra Apartment Ownership Act, 1970 (for short 1970 Act) make distinct provisions which completely rule out registration of coop.societies in the event requirements stipulated thereunder being not satisfied and fulfilled. In other words, once there is no compliance with the relevant statutory provisions, then, the application preferred by the first respondent was not maintainable. Mr.Godbole has emphasised this aspect and invited my attention to provisions of Section 10 of the 1963 Act. He submits that the deed of declaration is signed and executed and that fact has not been disputed so also its registration.

21. Mr.Godbole also assails the findings arrived by the Revisional Authority to the effect that function/obligation of a Builder comes to an end when he sells flats to the purchasers. He

has no right or locus standi thereafter. He submits that this finding is ex facie erroneous in law in as much as it is vitiated by non application of mind. He submits that the Single Judge's judgement of this Court which has been relied upon by the Revisional Authority is not applicable to the facts of the present case and in any event has been rendered in ignorance of the statutory provisions, more particularly section 10(2) of 1963 Act. He, therefore, submits that the impugned order deserves to be set aside and this is a fit case where this Court should interfere in its writ jurisdiction.

22. On the other hand Mr.Dhakephalkar, learned Senior Counsel appearing for the contesting respondents submits that the concurrent findings do not require any interference and the petition deserves to be dismissed. He submits that this Court has already taken a view that Builders and Developers

have no locus in matters of administration and management of the property by the flat purchasers. He submits that this is in consonance with the general principles inasmuch as there is a concept of dual ownership. The Developer of land and flat purchasers do not have a direct contact with the owner of land who gives authority to developer and builder for putting up construction and sell the flats to third parties. Such purchasers, thereafter, get a title to the structure and it is the duty of the developer/builder, who has taken development cum sale rights, from the owner to transfer the land beneath the structure by executing a comprehensive deed in that behalf. This obligation on the developer and builder can by no stretch of imagination be construed as conferring upon him a right to object to the manner in which the property is to be managed and administered by the respective flat/tenement purchasers. Mr.Godbole's argument is totally misconceived and

fallacious, according to Mr.Dhakephalkar. He submits that even if all the statutory provisions are noticed, the conclusion drawn by learned Single Judge about the authority and locus of builder/developer does not suffer from any error, much less can be said to be per incuriam. Therefore, the revisional authority was in no error in upholding the orders before him.

23. Mr.Dhakephalkar states that even the factual position is such that the petitioner - developer did not fulfil his obligation and duties in law. He admittedly has not executed any deeds of apartment and got them registered. Thus, when he was utterly neglecting his duties and obligation in law, the flat purchasers had no alternative but to organise themselves and apply for registration of a society which was formed by them. It is not the case of the Developer/Builder that the statutory minimum number for forming a coop.society is not

fulfilled. On the other hand, after the society was registered and to be precise during the pendency of the Revision Application that the deeds of apartments were executed by the Developer/Builder. This does not frustrate the registration of the coop. housing society which is much prior in point of time. There is no material produced on record that the second respondent society does not exist in law or that the flat purchasers have given up their rights/membership in the society as alleged. In the absence of any factual material and merely on the strength of the deeds of apartment, for the first time, the builder/developer cannot raise a contention that the registration of the society is illegal. This is not a pure question of law and the material for applicability of section 10(2) has to be produced before the authorities in that behalf. Therefore, even on facts and considering the conduct of the builder, this Court should not exercise its extra ordinary,

equitable and discretionary jurisdiction in its favour.

24. For the purpose of appreciating rival contentions, reference would have been necessary to be made to the 1963 Act initially. That is an Act to regulate for a certain period in the State of Maharashtra, promotion of construction and sale and management and transfer of flats on ownership basis. There is much substance in the contention of Mr.Dhakephalkar that apart from noticing acute shortage of flats in several areas of State, there were complaints of large scale abuse and mal practices relating to promotion of the construction of, and the sale and management and transfer of flats. It is, therefore, that the Legislature stepped in and enacted the 1963 Act. The term "Promoter" as defined in section 3(c) therein means a person who constructs or causes to be constructed block or building of flats or apartments for the purpose of selling

some or all of them to other persons or to a Company, Coop.Society or to a company or Coop.Society or other Association of persons and includes his assigns. It is pertinent to note that where a person who builds and a person who sells is different person, then, the Term would include both. The definition of the term "Flat" is to be found in section 2(a). The term "Registrar" has been defined in section 2(d) to mean the Registrar as defined in Maharashtra C.S.Act. The expression "Apartment" and "Apartment Owner" are defined to have the same meaning as are assigned to them in the 1970 Act. Section 3 enlists liabilities of Promoter whereas section 4 sets out his obligations. His obligations are that he has to execute a written agreement for sale. He must enter into a written agreement for sale with each of the persons who are to take or have taken flats and register that document in accordance with the Registration Act. Section 4(1)(A) sets out contents of the

Agreement and the documents attached thereto. Consequences of registration would then follow and the further obligation of the promoter are to be found in sections 5 and 6. Section 7 indicates clearly that after plans and specifications are disclosed to the intending purchasers of flat/s the promoter cannot make any alterations or additions in the same without their consent. Even defects which are noticed within three years have to be rectified by the promoter. Thus, the intent is clear inasmuch as the promoter will have to perform all duties and functions so as to ultimately convey the property to the flat purchasers. He cannot continue to retain control and enjoy any rights therein. Even if, there are any rights accrued in his favour, their exercise is sought to be regulated and controlled by the Legislature. This aspect becomes more clear after sections 8, 9 and 11 are perused. Section 13 sets out the Offences by Promoters.

25. It is in this backdrop that section 10 will have to be looked at. It reads thus:-

"10(1): As soon as a minimum number of persons required to form a cooperative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a cooperative society or as the case may be, as a company; and the promoter shall join, in respect of the flats which have not been taken, in such application for membership of a cooperative society or as the case may be, of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions

of this Act.

(2) If any property consisting of building or buildings is constructed or to be constructed and the promoter submits such property to the provisions of the Maharashtra Apartment Ownership Act, 1970, by executing and registering a Declaration as provided by that Act, then the promoter shall inform the Registrar as defined in the Maharashtra Cooperative Societies Act, 1960, accordingly; and in such cases, it shall not be lawful to form any cooperative society or company."

26. A bare perusal of subsection (1) thereof would indicate that since minimum number of persons required to form a Coop.Society or a company has taken flats, the promoter shall within a prescribed period submit an application to the Registrar for Registration of the

organisation of persons who take flats, as Coop.Society or as the case may be as company. The obligation does not end here. The promoter shall join flats which are unsold or non listed in an application for membership of a coop.society or as the case may be of a company. However, his right to dispose of the remaining number of flats in accordance with the provisions of the 1970 Act are left undisturbed and uninterfered with.

27. Sub-section 2 is very clear inasmuch as, if the property consisting of building or buildings is constructed or to be constructed and the promoter submits such property to the provisions of the 1970 Act by executing and registering a declaration as provided by that act, then, the promoter shall inform the Registrar as defined in the M.C.S. Act accordingly and in such cases, it shall not be lawful to form any cooperative society or

company.

28. Thus, firstly, there should be a property consisting of building or buildings. Secondly, it should either be constructed or to be constructed. Thirdly, the promoter must submit such property to the provisions of 1970 Act by executing and registering declaration as provided by that Act. Fourthly, the promoter shall inform the Registrar of Coop.Societies about such submission, execution and registration or declaration. Fulfilment of all these ingredients would make registration of a coop.society or company unlawful.

29. In the present case, the material about fulfilment of the ingredients of section 10(2) is absolutely lacking. In fact, one is not sure as to whether the declaration which was executed by the owners of the land and the petitioner as developer dated 23rd July 1997 and allegedly

registered was a fact which was duly intimated and informed to the Registrar by the promoter.

30. Therefore, it is doubtful as to whether sub-section 2 of section 10 would be attracted in the facts of the present case.

31. The 1970 Act is an Act to provide for ownership of an individual apartment in a building and to make such apartment habitable and transferable property. The term "apartment" is defined in section 3(a). Section 2 of the 1970 Act makes it clear that the Act applies only to property, the sole ownership or all the owners of which submit the same to the provisions of the 1970 Act by duly executing and registering a declaration as provided therein. Section 2 of the 1970 Act reads thus:-

"(2) This Act applies only to property, the sole owner or all of the

owners of which submit the same to the provisions of this Act by duly executing and registering a Declaration as hereinafter provided".

32. Hence, whether the sole owner or the owners in the present case have submitted the subject property to the 1970 Act in accordance with the Act. The term "property" has been defined so also the term "declaration", respectively in section 3(r) and (j) of the 1970 Act. Section 5 of the same reads thus:-

"5. "Ownership of Apartments" (1)

Each apartment owner shall be entitled to the exclusive ownership and possession of his apartment in accordance with the declaration executed and registered as required by section 2 of this Act.

(2) Each apartment owner shall

execute a Deed of Apartment in relation to his apartment in the manner prescribed for the purpose.

A bare perusal of section 5 would indicate that the declaration contemplated by section 2 and the one contemplated by section 5(2) are distinct. The deed of apartment is a distinct deed than that of declaration. Their contents are also distinct as is evident from sections 11 and 12. Section 13 of the 1970 Act reads thus:-

"13. Declarations, Deeds of Apartments and copies of floor plans to be registered:- (1) The Declaration and all amendments thereto and the Deed of Apartment in respect of each apartment and the floor plans of the buildings referred to in sub-section (2) shall all be registered under the Registration Act, 1908.

(2) Simultaneously with the registration of the Declaration there shall be filed alongwith it a set of the floor plans of the building showing the layout, location, apartment numbers and dimensions of the apartments stating the name of the building or that it has no name, and bearing the verified statement of an architect certifying that it is an accurate copy of portions of the plans of the building as filed with and approved by the local authority within whose jurisdiction the building is located. If such plans do not include a verified statement by such architect that such plans fully and accurately depict the layout, location, apartment numbers and dimensions of the apartments as built, there shall be recorded prior to the first conveyance of any apartment, an

amendment to the Declaration to which shall be attached a verified statement of an architect certifying that the plans theretofore filed, or being filed simultaneously with such amendment, fully and accurately depict the layout, location, apartment number and dimensions of the apartment as built.

(3) In all registration offices a book called "Register of Declaration and Deeds of Apartments under the Maharashtra Apartment Ownership Act, 1970" and Index relating thereto shall be kept. The book and the Index shall be kept in such form and shall contain such particulars as the State Government may prescribe.

(4) It shall be the duty of every Manager of Board of Managers to send to the Sub-Registrar of the Sub-District in

which the property containing the apartments situate, or if there is no Sub-Registrar for the area, to the Registrar of the District in which such property is situate a certified copy of the Declaration and Deed of Apartment made in respect of every apartment contained in the building forming part of the property together with a memorandum containing such particulars as the State Government may prescribe.

(5) The Sub-Registrar, or as the case may be, the Registrar shall register the Declaration alongwith floor plans of the building and the Deed of Apartment in the Register of Declarations and Deeds of Apartments under the Maharashtra Apartment Ownership Act, 1970 and shall also enter particulars in the Index kept under sub-section (3). Any person

acquiring any apartment of any apartment owner shall be deemed to have notice of the Declaration and of the Deed of Apartment as from the date of its registration under this section.

(6) Except as provided in this Section, the provisions of the Registration Act 1908 shall mutatis mutandis apply to the registration of such Declarations and Deeds of Apartments and the words and expressions used in this Section but not defined in this Act, shall have the meanings assigned to them in the Registration Act, 1908."

33. It is in this backdrop, section 14 will have to be seen and which reads thus:-

"14. Removal from provisions of Act:-

(1) All the apartment owners may remove a property from the provisions of this Act, by an Instrument to that effect duly executed;

provided that, the holders of all charges and other encumbrances affecting any of the apartments consent thereto or agree, in either case by instruments duly executed that their charges or encumbrances be transferred to the percentage of the undivided interest of the apartment owner in the property as hereinafter provided.

(2) Upon removal of the property from the provisions of this Act, the property shall be deemed to be owned in common by the apartment owner. The undivided interest in the property owned in common which shall appertain to each apartment

owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities."

34. Hence, unless the material is produced to show that requirements stipulated by section 13 are fulfilled, it cannot be said that the property is submitted to the provisions of 1970 Act. Further, the submission of the property to the 1970 Act itself is not enough for the purpose of section 10 of 1963 Act, as observed above.

35. In the facts and circumstances of the present case, nothing has been pointed out which would demonstrate that the application of the first respondent for registration of second respondent society could not have been entertained by the Dy.Registrar. There is substance in the contention of Mr.Dhakephalkar that in these facts and circumstances, the

petitioner - developer had no right to object to the application being entertained and considered by the Authorities exercising powers under the Coop.Societies Act. It is in the peculiar facts of this case, I find substance in the contention of Mr.Dhakephalkar that the petitioner - developer had no locus to object to the registration of second respondent society which had already been done as far back as on 30th July 1999. The interim orders do not have the effect of wiping out such registration in the facts of this case and once it had taken effect, the second respondent could not be prevented from managing and administering the affairs of the cooperative housing society.

36. In the peculiar facts of this case, the larger question posed for my consideration about the locus of builder and developer in general and the judgement of this Court requiring re-consideration, need not be gone into and

decided. Similarly, the larger issues as to when can a property be said to be subjected to 1970 Act and, therefore, incapable of being administered by forming a coop.society or company also need not be considered.

37. When there is substance in the contention about lack of factual materials being placed before the Authorities so as to object to the registration and the registration having already taken effect in the year 1999, this is not a fit case for interference by this Court in its extraordinary, equitable and discretionary jurisdiction under Articles 226 and 227 of Constitution of India. There is much substance in the observations of the Dy.Registrar that the petitioner - builder has failed to comply with the provisions of law. In this behalf, finding of fact recorded at para 8 (pages 30 and 31) of the order passed by the Dy.Registrar being not perverse and consistent with the materials

placed, no relief can be granted to the petitioner in this case.

38. In the result, petition fails. Rule is discharged. All interim orders to stand vacated forthwith.

(S.C.Dharmadhikari, J)